Palomar Transport, Inc. *and* Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] Case 31-CA-10470

March 22, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 20, 1982, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Palomar Transport, Inc., Upland, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Charging Party's name is hereby corrected to conform to the charge.

[2] We agree with the Administrative Law Judge that Respondent has demonstrated a proclivity to violate the Act so as to warrant a broad remedial order in this case. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). In doing so, however, we rely solely on Respondent's unfair labor practices found herein and those set out in our Decision at 256 NLRB 1176 (1981).

Members Hunter and Zimmerman find it unnecessary to pass on the question of whether or not an administrative law judge's decision to which no exception has been taken may properly be used to support a finding of proclivity to violate the Act so as to warrant issuance of a broad order.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard in Los Angeles, California, on July 29, 1982. The charges was filed on September 24, 1980, by Material and Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). The complaint as now constituted issued on October 13, 1981, and alleges that Palomar Transport, Inc. (Respondent), has violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) since about September 15, 1980, by "fail[ing] and refus[ing] . . . to reinstate Jackie Jenner and Lora Hector to their former positions of employment."

I. JURISDICTION

Respondent, a California corporation, is engaged in and around the community of Upland in the transportation of special-education students to and from school. Its annual revenues exceed $500,000 and it annually purchases items of a value exceeding $10,000 from suppliers within California who obtained such items directly from outside the State.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. *Background*

In April 1979, certain of Respondent's approximately 70 schoolbus drivers began campaigning for union representation. On May 2, the Union filed a petition for election with the NLRB, and an election followed on October 26.[1] On September 4, 1980, after disposition of assorted objections to the conduct of the election and challenges to voter eligibility, the Union was certified as the drivers' bargaining representative.[2]

B. *The Jenner Situation*

Facts. Jenner was a driver for Respondent for about 4 years until April 25, 1980, when she left to undergo surgery for a job-related arm injury. While convalescing, she received a note from Sue Hubert, Respondent's operations manager, thanking her "for a good year of driving . . . [and] . . . for helping me out when I needed it," and expressing the "hope to see [Jenner] back in good shape this fall."[3]

On August 25, 1980, Jenner provided Respondent with a slip from her surgeon, Dr. G.E. Garland, authorizing her to "return to her preinjury job on 5 Sep. 80." On August 26, Hubert acknowledged to Jenner in a telephone conversation that she had custody of Dr. Garland's release, and suggested that Jenner call back after September 5 about route assignments for the oncoming school year.

On September 4, as above-noted, the Union was certified as the driver's bargaining representative. On September 11, Jenner called in as Hubert had suggested, being told by Dennis Miranda, Respondent's driver-trainer, that the routes were still being worked on and that she should call later. She was told much the same thing, by

[1] Case 31-RC-4500.

[2] Later, based on a disclaimer of interest filed by the Union on June 19, 1981, the Regional Director issued an order revoking the certification.

[3] Respondent's busing activities correspond generally with the conventional fall-through-spring academic year.

one or the other of two secretaries, when she called on the 12th and visited the office on the 13th. Finally, calling in on the 14th, Jenner was told by one of the secretaries that there was "not going to be a route for" her that year. Asked why not, the secretary answered that she did not know, but would arrange for Richard Harney, company president, to call Jenner about it.

On September 18, having received no word from Harney, Jenner sent him a certified letter recounting most of the foregoing events and concluding:

> I have waited for your call and not received it and I would like the courtesy of knowing why I did not receive a route this year.

Jenner in addition tried to reach Harney by telephone, calling the office about twice a week for several weeks. He "was always gone," as she recalled. She consequently would leave her name, and the person on the other hand, either Miranda or one of the secretaries, would say that Harney would call her back.

In mid-October, yet to receive a response to her letter or a return call from Harney, Jenner "finally got through" to him by telephone. He stated, to her query why she had not been given a route, that there was "none available." Asked if this was because of a workers' compensation claim arising from her surgery, he replied, "No, there just wasn't a route." She then mentioned the letter she had sent asking for an explanation and Harney's failure to answer. He persisted, "There just wasn't anything available."

That was followed by a letter from Harney to Jenner, sent November 11, in which he stated:

> We were notified on November 5, 1980, that you were released from your injury. Presently we do not have any openings for a regular school bus route, however, we can use you on Charter and Field Trips. If you desire to work on such, please notify us in writing, giving days and times you would be available for this type of work.

Jenner responded by letter dated December 1, stating in part:

> In regard to your letter mailed [received] Nov. 14, 1980. You stated that you were notified on Nov. 5, 1980, that I was released from my injury. I'm enclosing a copy of my release from injury dated Sept. 5, 1980. As you can see, the Nov. 5, 1980, is a wrong date.[4]

Jenner's letter added that she would accept a position driving for charter trips and field trips, but "not a wheelchair van," "until the next school bus route is available," and that she would be available Monday through Friday from 9 a.m. to 5 p.m.

Jenner next heard from Respondent on December 3, being asked to drive for a field trip. She declined because she had to accompany a relative to court. Then, on New Year's Eve, she was asked to drive a "fog run" between the Los Angeles and Ontario (California) airports. She again declined, citing her never having driven a fog run. Finally, on January 6, 1981, despite the statement in her December 1 letter that she would not drive a wheelchair van, she was offered a regular route driving such a vehicle. She declined once more, mentioning a broken foot incurred a month before and that she did not drive wheelchair buses.[5]

Jenner made the initial contact with the Union, on April 20, 1979, regarding the drivers' interest in representation. That same day, she and two coworkers, Ida Miller and Kathy Shexnyder, met with a union business agent at Miller's home; and, in the succeeding week or so, she passed out union authorization cards in the drivers' lounge at Respondent's facility. The election petition, as earlier mentioned, was filed May 2.

A week after the organizational onset, on April 27, Jenner and two coworkers above-named were summoned to the office one at a time to meet with Harney and Respondent's vice president, James Gehle. During those meetings, Harney and Gehle made various utterances found by the Board in another proceeding to have violated Section 8(a)(1) of the Act.[6] Among the unlawful remarks, the employees were told that management knew about the April 20 meeting with the business agent and the ensuing distribution of cards, and that Respondent would have to close if the drivers obtained union representation; and Jenner was told that Respondent would use substitute drivers and take $15,000 in benefits from the drivers if they "went union."[7]

Soon thereafter, in May 1979, Respondent began to withhold extra driving assignments—namely, charter and field trips—from Jenner, a practice persisting until she left for surgery in April 1980. This was found by the Board, in yet another proceeding, to have violated Section 8(a)(3) and (1).[8]

Respondent's only witness herein was Wayne Fritz, Harney's nephew, who has been vice president since February 1981 and was Harney's administrative assistant

[4] At the instance of the State Compensation Insurance Fund, Jenner submitted to examination by an SCIF-designated physician, K. S. Tabacopoulos, on October 22, 1980, during which he gave her a "Certificate for Return to School or Work." The sole purpose of this examination, according to Patrick Sullivan, a claims representative for SCIF, was to determine the extent, if any, of permanent disability, benefit payments long since having been discontinued based on the release by Jenner's treating doctor, Garland. Dr Tabacopoulos' release thus does not warrant an inference that Jenner was not previously able to return to work, and there is no evidence that Respondent deemed her incapable pending its issuance.

[5] Jenner testified that she had driven a wheelchair bus only once and that she does not consider herself qualified to do so. She elaborated: "[T]here's no seats in the buses except for the driver and maybe a passenger. The back of the van is empty and you roll in wheelchairs and strap them down. They're children in wheelchairs and you have to know how to strap them down and . . . that wasn't part of my job. Mine was just driving kids with braces that you would put in the seat and buckle in."

[6] This matter was heard before Administrative Law Judge Joan Wieder on December 18, 1979. Her decision issued May 19, 1980. (JD-(SF)-158-80.) Exceptions were not taken and it was affirmed by order of the Board dated June 24, 1980.

[7] JD-(SF)-158-80, *supra* at sl. op., p. 6.

[8] *Palomar Transport, Inc.*, 256 NLRB 1176 (1981). This matter was heard before Administrative Law Judge Clifford Anderson on October 30 and November 12, 1980. His decision issued March 17, 1981.

when the conduct now in issue occurred. Fritz testified that the decision not to hire Jenner in September 1980 was Hubert's, and that he "wasn't involved" in it. The record gives no reason for Hubert's and Harney's not testifying.

Although Harney asserted to Jenner in their October 1980 conversation that Jenner had not been given a route because none was available, Respondent had run this advertisement in the help-wanted classification of an area newspaper from September 19 to 22:

SCHOOL BUS DRIVERS
Part Time
*Men & Women—train
now for employment.
*Free Training Program.
*Excellent opportunity for
housewives & retired.
*Good driving record a
must.
Permanent Positions
Apply in Person

Jenner testified credibly and without refutation that the advertisement described the position she had held with Respondent. She enlarged:

> They say it's part-time because we only work four to five hours a day . . ., but yet we were considered full time because we worked five days a week.[9]

Respondent has run this same advertisment recurrently over the years. Fritz testified that Respondent trains drivers at its Upland facility not only for its busing activities there, but for its busing activities in Long Beach and for other employers. There is no evidence, however, that this advertisement was meant on this or any other occasion to attract enrollees to the driver-training program rather than, as indicated on its face, applicants for driving positions out of the Upland facility.

Conclusion. It is concluded that the failure to assign a route to Jenner in September 1980 violated Section 8(a)(3) and (1) as alleged.

1. Respondent betrayed a disposition to discriminate against Jenner because of her union activities when it earlier unlawfully withheld the extra driving assignments from her.

2. The Union's finally being certified in early September 1980 likely refueled the union animus harbored by Respondent and which underlay its previous unlawful discrimination against Jenner.

3. Harney's assertion to Jenner that she had not been given a route because none was available was effectively discredited by Respondent's advertising for drivers in September 1980.

4. The protracted difficulty encountered by Jenner in her attempts, by letter and telephone, to engage Harney in a dialogue concerning her being bypassed suggests that Repsondent knew its treatment of her to be indefensible.

5. Harney's unexplained misrepresentation, in his November 11 letter to Jenner, that Respondent was notified on November 5 of her medical release, rather than before the routes were assigned in September, bespeaks an after-the-fact effort to piece together some kind of plausible defense to the present charge.

6. Respondent's unexplained failure to bring to the forum the putative decisionmaker, Hubert, or Harney, whom one must surmise from the overall record and the earlier decisions also participated, instead bringing a single witness who admittedly "wasn't involved," indicates a perceived inability to withstand scrutiny. The General Counsel having by other means made out a *prima facie* violation, this can only be seen as reinforcing the inference.

C. *The Hector Situation*

Facts. Hector drove for Respondent from September 1977 to June 1979. She was not hired for the 1979–80 school year for the reason that, being 7 month's pregnant in September 1979, her availability would be too brief. Gehle, Respondent's vice president at the time, told Hector, however, that she would be "more than welcome to come back and apply" after she had had the baby and felt ready to return.[10]

Hector next contacted Respondent in July 1980, informing Hubert, the operations manager, that she wanted "to come back to work" and was "available." Hubert, remarking that routes for the coming year were yet to be assigned, advised Hector to check back about September 10. Hector accordingly called Hubert on September 10—i.e., some 6 days after issuance of the Union's certification. Hubert told her to check back on the 13th. Hector spoke to Hubert in person on the 13th, being told once more that the assignments were not ready. Hector called twice the next day, September 14, speaking both times with a secretary. She was told the first time that assignments were still in process; and, the second, "There won't be a route for you this year."

On September 15, and for 4 or so days thereafter, Hector made a number of attempts to reach Harney, Respondent's president, by telephone. He reportedly was unavailable in each instance, whereupon Hector generally if not always left her name and asked that he call her.[11] Harney never did call, and she never received an explanation for not getting a route on this occasion.

Hector joined Jenner in passing out union cards in the drivers' lounge in April 1979, and was vocal in touting the advantages of representation to "a lot of people in the lounge" at that time. Hector testified that she "hoped" she was not heard by management officials while undertaking these activities, and there is no direct evidence that they were known to management. It will be recalled, however, that Harney and Gehle told Jenner

[9] Jenner testified credibly and without refutation that none of Respondent's routes require more than 5 hours to complete.

[10] There is no contention that the refusal to hire Hector in September 1979 was improper.

[11] Hector also made an unsuccessful attempt to call Harney on the 14th, upon learning that she had not given a route. In that instance, she told the person answering that it would not be necessary that Harney call her back. Her later attempts, in which she asked that he call, were on the advice of the Union's business agent.

and her two coworkers, Miller and Shexnyder, on April 27, that they knew about the distribution of cards. Moreover, there is an intercom system between the office and the lounge which does not require activation from the lounge end to transmit from there to the office.

Hector, in addition, was among 30 to 35 employees at an organizational meeting at the union hall in Ontario in May 1979, during which she stood up and declared her reasons for wanting representation. Others there included Dennis Miranda, the driver trainer, and Cheryl Roy, one of Respondent's secretaries. Miranda's presence was contested by some because of his identification with management.[12] Roy sought to tape record the meeting. Being forbidden to do so, she was seen taking notes. The record leaves her purpose to conjecture.

When Hector last drove for Respondent, in the 1978–79 school year, Gehle once told her she was "doing a good job." She never received discipline or adverse management comment.

Respondent offered Hector a driving position for the summer of 1979, during the middle stages of her pregnancy. Upon learning that she could not accept because her certification had lapsed, Harney and Gehle apparently made a sincere but unsuccessful effort to quickly enroll her in a class and have the situation rectified.[13]

As earlier described, Respondent advertised for drivers in September 1980, at or about the time of its allegedly unlawful failure to assign a route to Hector; and, as previously noted, Respondent's only witness was Fritz, who testifed that the decision not to hire Hector—as well as Jenner—in September 1980 was Hubert's, and that he "wasn't involved" in it.

Conclusion. It is concluded that the failure to assign a route to Hector in September 1980, while not as demonstrably improper as the failure concerning Jenner, also violated Section 8(a)(3) and (1) as alleged.

The bases for this conclusion are these:

1. By its clearly unlawful failure to assign a route to Jenner Respondent evinced a willingness in September 1980 to withhold routes in retribution for union activity.

2. Hector was conspicuously prounion, as shown by her distribution of cards in the drivers' lounge and her espousal of the cause otherwise both in the lounge and during the May 1979 organizational meeting.

3. While there is no direct evidence that Respondent knew about Hector's ardent prounion feelings, it is inferable that it did. Thus, Harney and Gehle told Jenner, Miller, and Shexnyder on April 27, 1979, that they were aware of the distribution of cards; the intercom system between the office and the lounge was at management's ready disposal to eavesdrop on activities in the lounge; and Dennis Miranda, admitted by Respondent in an earlier proceeding to be an agent at relevant times in 1979,[14] attended the May 1979 organizational meeting in which Hector was outspokenly prounion.

4. All indications are that Hector had been a good driver for Respondent; and Respondent's advertising for drivers in September 1980 disclosed a need for drivers when she was bypassed.

5. Harney's failure to return Hector's repeated calls after she had been denied a route, despite her recurrent requests that he do so, and Respondent's failure otherwise to give her an explanation, suggest—as did similar disregard in the case of Jenner—that Respondent fully appreciated the weakness of its case for doing what it did.

6. Again as with Jenner, Respondent's unexplained failure to call as witnesses anyone involved in the decision revealed an aversion to being scrutinized, fortifying the *prima facie* case otherwise established.

CONCLUSION OF LAW

By failing to assign routes to Jackie Jenner and Lora Hector in September 1980, Respondent violated Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of facts and conclusions of law, and upon the entire record herein, I hereby issue the following recommended:

ORDER[15]

The Respondent, Palomar Transport, Inc., Upland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding route assignments from or otherwise discriminating against employees with regard to their terms or conditions of employment because of their union sympathies or activities.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under the Act.[16]

2. Take this affirmative action:

(a) Offer to Jackie Jenner and Lora Hector immediate and full reinstatement to their former positions as regular route drivers or, if those positions no longer exists, to substantially equivalent positions, discharging others if necessary to make room for them, without prejudice to their seniority or other rights and privileges; and make them whole, with interest, for any loss of wages or other benefits they may have suffered as a result of the discrimination against them.[17]

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[12] One of the earlier-cited decisions involving Respondent notes that Miranda was admitted by the pleadings to be an agent of Respondent *Palomar Transport, Inc., supra* at 256 NLRB 1176. No misconduct is attributed to him, however; and, he is mentioned only the one time. The present pleadings made no reference to him. He is, incidentally, the son of the business agent who presided over this meeting.

[13] Schoolbus drivers in California are required to be certified by the California Highway Patrol. Hector achieved recertification by September 1979, and was certified at all relevant times.

[14] See fn. 12, *supra.*

[15] All outstanding motions inconsistent with this recommended order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] This being the third decision since May 1980 in which Respondent has been found in violation of the Act, the General Counsel's request for a broad remedial order is granted. See, generally, *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[17] Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(b) Expunge from its files any reference to the failure to assign routes to Jenner and Hector in September 1980; and notify them in writing that this has been done and that evidence of those unlawful actions will not be used as a basis for future personnel actions against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and benefits owing under the terms of this Order.

(c) Post at its place of business in Upland, California, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The hearing in Los Angeles, California, on July 29, 1982, in which we participated and had a chance to give evidence, resulted in a decision that we committed unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

Section 7 of the National Labor Relations Act gives employees the following rights:

> To organize themselves
> To form, join, or support unions
> To bargain as a group through a representative they choose
> To act together for collective bargaining or other mutual aid or protection
> To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT withhold route assignments from or otherwise discriminate against employees with regard to their terms or conditions of employment because of their union sympathies or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in their excerise of rights under the Act.

WE WILL offer to Jackie Jenner and Lora Hector immediate and full reinstatement to their former positions as regular route drivers, or, if those positions no longer exists, to substantially equivalent positions, discharging others if necessary to make room for them, without prejudice to their seniority or other rights and privileges; and WE WILL make them whole, with interest, for any loss of wages or other benefits they may have suffered as a result of the discrimination against them.

WE WILL expunge from our files any reference to assign routes to Jenner and Hector in September 1980; and WE WILL notify them in writing that this has been done and that evidence of those unlawful actions will not be used as a basis for future personnel actions against them.

PALOMAR TRANSPORT, INC.